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IN THE

Supreme Court of the United States

October Term, 1959

No. 71

CHRISTOS VASSOS,

Petitioner,

vs.

SOCIETA TRANSOCEANICA CANOPUS, S. A., MARITRADE CORPORATION and the S. S. CANOPUS, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Vincent O'Connor,

Proctor for Respondents

26 Broadway,

New York 4, N. Y.

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Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 143 F. Supp. 945. The opinion of The United States Court of Appeals for the Second Circuit is officially reported in 272 F. 2nd 182.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However, the petition fails to specify any important reasons why in this case, under

the existing facts, a writ should be granted, nor does it indicate that any genuine reason for the granting of a writ, as set forth in Rule 19 of the Revised Rules of this Court, exists in this case.

Question Presented

Under all the material facts, the basic question presented is whether the Court of Appeals was correct in affirming a dismissal of a libel in admiralty which petitioner instituted after a civil action for the same relief and involving the same parties had been dismissed by a court of competent jurisdiction and petitioner had failed to appeal from the prior adjudication.

Statement

This suit concerns a belated attempt by the petitioner to avoid a prior adjudication of a question of jurisdiction involving the parties hereto and a determination that petitioner's claim for redress for bodily injuries was barred by the applicable statute of limitations. Instead of taking an appeal from the prior adjudication, petitioner permitted the time therefor to expire. Then some eight months later, and after more than six years had expired from the date on which the events which gave rise to petitioner's claim for redress had occurred, petitioner sought to revive the claims which had been previously dismissed by merely commencing a new and separate action thereon in admiralty. Petitioner sought to justify this second, separate and independent action for the same causes by contending that it was unrelated to the first because the theory on which it was predicated was different than that on which he proceeded in his initial action.

These contentions were rejected by the District Court as a basis for an independent action seeking redress for the same wrong previously adjudicated. The second action was thereupon dismissed and this dismissal was affirmed by the Court of Appeals.

In his petition, the petitioner for all intents and purposes has abandoned his previous contentions. Instead, he now seeks to make it appear that the second separate action was merely a step in the initial proceeding and that the court below was therefore in error because it did not so consider it, even though petitioner did not so contend below.

As appears from the statement of facts set forth herein below, the petition is not a true guide to the proceedings in this matter and furnishes no basis for review by this court.

The Facts

Petitioner, an alien seaman, initially commenced a civil action in the United States District Court for the Southern District of New York against the respondent Mar-Trade Corporation seeking redress for bodily injuries which he claimed he sustained on May 15, 1949 while employed aboard the S S *Canopus*, a vessel of Panamanian registry. In the complaint it was alleged that Mar-Trade Corporation owned and operated the S S *Canopus* and that the action was based on the Jones Act (46 U. S. C. 688).

Thereafter by leave of court petitioner filed an amended complaint adding the respondent Societa Trans-Oceanica Canopus, S. A. as a party defendant. This amended complaint was served on the respondents on January 21, 1953 or more than three years and nine months after the causes of action had accrued. The complaint alleged in

substance that the S S *Canopus* was owned and operated by the respondent Societa Trans-Oceanica Canopus, S. A., that the respondent Mar-Trade was a shoreside agent, that the petitioner was injured "wholly and solely by reason of the dangerous, defective and unseaworthy condition of the vessel and the negligence of the defendants, their officers, agents, crew or employees in improperly storing the ship's supplies and otherwise * * * ", and also that by virtue of the Jones Act plaintiff was entitled to recover damages for the negligence of the defendants and of their co-employees in their service on said vessel.

On December 28, 1954 on application of the respondents, the District Court granted judgment to respondents, dismissing the complaint with respect to Mar-Trade Corporation *in toto*, and with respect to Societa Trans-Oceanica Canopus S. A, dismissing all causes of action except that for maintenance and cure. In addition it held that insofar as the cause of action against Societa Trans-Oceanica Canopus, S. A. "may be based on the maritime law of unseaworthiness, the affidavit submitted on behalf of the plaintiff presented no facts which would warrant the exercise of discretion to entertain jurisdiction in this court of an action between aliens."

For some eight months thereafter, petitioner took no action in that suit. No proceeding of any nature whatsoever either in the nature of a motion, an appeal or otherwise, was attempted by petitioner with respect to this adverse adjudication. Instead on August 11, 1955, or when more than six years had elapsed after the occurrence of the events which gave rise to the alleged claim for bodily injuries, petitioner instituted a new and separate action in admiralty. In the libel an attempt was made to avoid the effect of the prior adjudication by urging that, though the claim was for the same bodily injury and was

bottomed on negligence and unseaworthiness, as in the previous action, this action was different because the theory of liability being therein urged was different.

On application of the respondents, the District Court (Judge Bicks) dismissed the libel. In rejecting petitioner's contention that the law did not allow him to conduct his litigation in such piecemeal fashion, and that in any event his remedy was by appeal and not by a new action, it said (143 F. Supp. 945, 946):

> "... an injured seaman suffers but one actionable wrong and is entitled to but one recovery whether his injury is due to the unseaworthiness of the vessel, the negligence of the owner as defined by the General Maritime Law, the negligence of the officers, or the crew, as defined by the Jones Act, or by a combination of some or all of such causes. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.' Baltimore S. S. Co. v. Phillips, 1927, 274 U. S. 316, 321, 47 S. Ct. 600, 602, 71 L. Ed. 1069. The libelant was bound to set forth in his first suit every ground of recovery which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon the piecemeal in successive actions to recover for the same wrong and injury." Id., 274 U. S. at page 322, 47 S. Ct. at page 603.

> "As already indicated one of my distinguished colleagues, in the exercise of discretion, declined to entertain jurisdiction of the action against Trans-Oceanica based on unseaworthiness. That order, though appealable, was never brought up for review. While comity persuades but does not com-

mand, Mast, Foos & Co. v. Stover Mfg. Co., 1900, 177 U. S. 485, 488, 20 S. Ct. 708, 44 L. Ed. 856, and there is no imperative duty to follow the earlier ruling, Dictograph Products Co. v. Sonotone Corp., 2 Cir., 1956, 230 F. 2d 131, 135, a defeated suitor should pursue his remedy by appeal and not shop about in the hope of finding a Judge favorably disposed to his view. Libelant has presented no controlling facts which were not before Judge Edelstein. For the foregoing reasons and in the exercise of its independent discretion, the court declines to accept jurisdiction of the controversy between libelant and Trans Oceanica.".

Petitioner thereupon appealed and the Court of Appeals affirmed the judgment of the District Court (App. Petition p. 43).

Reason for Denying the Writ

(1) The decision below is clearly correct. It does not deprive a litigant of the right to challenge a prior adjudication because he may not agree with it. All that it does is prevent the petitioner from relitigating the same issues over and over again in separate and independent actions in the hope of obtaining a more favorable result. Petitioner could have had a review by appeal or even by motion in the same court, however he failed to avail himself of these remedies. Instead he now seeks to have this Court void the effects of such failure. He now attempts to claim for the first time, in this court, that an entry of judgment for maintenance and cure in petitioner's favor extended not only his time to appeal from the prior adjudication but also that it conferred a right on him to relitigate in a new action the issues adjudicated in that prior, separate and independent action.

Apart from the fact that the count for maintenance and cure was a separate count from those that had been adjudicated previously and was tried as such, and a separate judgment entered thereon, the question of appealability is now moot in any event because even the time to appeal from that judgment has also expired and no appeal has been taken. Petitioner thus cannot save himself by claiming that when he commenced the second action, his time to appeal had not expired and the second action was therefore proper. As has been pointed out by this court in *United States v. Munsingwear*, 340 U. S. 36, 39, a judgment in the first suit is binding in any subsequent actions, if an appeal, though available, has not been taken or perfected. There is, certainly, no right to relitigate the issues in an independent action. An issue which has been litigated and decided in the court where the judgment was rendered may not be relitigated anew in another court. *Hyde v. Woodruff*, 327 U. S. 726. Even when the principle of *res judicata* is applied narrowly, an adjudication in a prior action nonetheless operates as an estoppel on those matters which were put in issue and a determination made. As this court pointed out in *Commissioner of Internal Revenue v. Sunnen*, 333 U. S. 591, 598:

> "Once a party has fought out a matter in litigation with the other party, he cannot later review that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment or collateral estoppel." . . .

Accordingly, petitioner's second independent action was improper and the holding by the Court of Appeals that the prior adjudication was *res judicata*, was correct.

(2) Petitioner's contention that the decision below deprives him of a substantial right and is contrary to previous decisions of this court, as well as those of the court below, is incorrect. In *Baltimore S. S. Co. v. Phillips*,

274 U. S. 316, 325 this Court expressly held that a new theory of liability would not support a subsequent action for the same wrong. This principle was reaffirmed in *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221 when this Court said at pages 224-225:

> "* * *. But if the seaman is to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding. That is a consequence of this court's decision in Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. ed. 1069, 47 S. Ct. 600, which held that these claims were but alternative 'grounds' of recovery for a single cause of action. * * *."

Thus when the Court of Appeals affirmed the District Court's holding that petitioner could not bring successive actions for the same wrong and injury, it was following the rule laid down by this Court and it created no basis for review by this Court in this action. If other, earlier, discussions of the Court Below are in conflict with this principle, they are not the prevailing law. It is not the function of this Court to review a case correctly decided for the purpose of correcting such conflicts.

(3) Under the facts of this case, there is no misinterpretation of the Federal Rules of Civil Procedure. In the first action petitioner litigated the question of whether his action under the Jones Act (46 U. S. C. A. 688) was timely and whether, insofar as the action under the general maritime law was concerned, there were facts which warranted the exercise by the court of its discretion to entertain or to decline jurisdiction of an action between two aliens. Having adjudicated those issues, they could not be inquired into in the subsequent action.

As this Court pointed out in *Stoll v. Gottlieb*, 305 U. S. 165, 172,

> . . . . After a Federal Court has decided the question of the jurisdiction over the parties *as a contested issue*, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. . . . " (Emphasis supplied.)

Such an adjudication is on the merits and is binding even though the ultimate substantive issues are not reached. In *Angel v. Bullington*, 330 U. S. 183, this Court stated in this connection at page 190:

> . . . . It is a misconception of res judicata to assume that the doctrine does not come into operation if a Court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State. . . . .

Thus petitioner can not avoid the prior adjudication by instituting an independent action in which the same matters would again be brought into issue.

Since Rule 60(b) of the Federal Rules of Civil Procedure prescribes the procedure for reopening a judgment in a civil action, and an independent action in admiralty in total disregard of the prior adjudication such as petitioner attempted here is not permitted by that Rule, there was no misinterpretation of Rule 60(b) by the Court below.

It is fundamental that rules governing procedure in State Courts have no application to procedure in Fed-

eral Courts. In any event Section 23 of the New York Civil Practice Act does not authorize an independent suit for purposes of avoiding a prior adjudication on the merits.

(4) The decisions of the Court below in *Western Electric Co.* v. *Pacent Reproducer Corporation*, 37 F. 2d 14, and *Piasecik* v. *Trader Navigation Co.*, 178 F. 2d 886 are not in conflict with the decision below and furnish no basis for any different result in this matter. In the *Western Electric* case, the order of dismissal which had been entered was held not to be final because it had a condition attached thereto. The condition, "With leave to amend" required a further order of the court after the time allowed for amendment had expired in order to finally dispose of the claim. In the present action the dismissal left nothing further to be done, and was therefore final. *Reeves* v. *Beardall*, 316 U. S. 283; *Sears Roebuck & Co.* v. *Mackey*, 351 U. S. 427; *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445.

It is also obvious that the decision in *Piasecik* v. *Trader Navigation Co.*, 178 F. 2d 886 has no application to the facts of this case. In the *Piasecik* case there was a dismissal as to one of the defendants who was jointly charged and the count which remained outstanding was inseparable from the one which had been dismissed. It therefore differs from the present action because as this Court said in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546, the initial dismissal was "nothing more than a step towards final judgment." In *Piasecik* a disposition of the other claim was necessary before the appellate court would have anything to adjudicate. In the present action, the prior adjudication disposed of matters which were not related to or in any way dependent on the disposition to be made in the claim for maintenance and cure. The prior judgment was in all respects final and appealable. *Cohen*

v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546-547; *Swift & Co.* v. *Compañía Colombiana*, 339 U. S. 684. However, as has been pointed out in subdivision (4), any question based on appealability is now moot in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Counsel for Respondents.

PAUL M. JONES,
Of Counsel.